

Date: 20021003
Docket: CAC 159286

NOVA SCOTIA COURT OF APPEAL
[Cite as: *R. v. Assoun*, 2002 NSCA 119]

BETWEEN:

GLEN EUGENE ASSOUN

Applicant/Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

D E C I S I O N

Counsel: Jerome Kennedy for the applicant/appellant
Edward A. Gores for the respondent
Walter Yeadon for Nova Scotia Legal Aid
John Bonn for Nova Scotia Legal Aid Commission

Application Heard: October 3, 2002

Decision Delivered: October 3, 2002

BEFORE THE HONOURABLE JUSTICE FREEMAN IN CHAMBERS

FREEMAN, J.A. (In Chambers) (Orally):

- [1] This is the second attempt by the applicant, Glen Assoun, to persuade a chambers judge of this court to assign counsel at public expense to assist him in his appeal of a murder conviction for which he is serving a life sentence with no chance of parole for 18.5 years. His appeal is scheduled to be heard November 12, 2002.
- [2] He was arrested in Chilliwack, British Columbia, where he had been living since 1996, and charged at Halifax, Nova Scotia in an information dated March 25, 1998, with the first degree murder of Brenda LeAnne Way, whose body was found November 12, 1995 in Dartmouth, Nova Scotia. Self-represented at his trial, he was convicted of second degree murder on September 17, 1999. He filed a notice of appeal on October 15, 1999, but the hearing has been delayed, principally because of his efforts to find counsel who will represent him.
- [3] Justice Cromwell denied his application for counsel in a decision filed April 12, 2002, on grounds that Mr. Assoun had failed to persuade him that he lacks the means to retain counsel. At the time of his arrest Mr. Assoun was living as man and wife with Dorothy Bersuk and was receiving two disability pensions totaling about \$2,000 a month. The larger of these, a Sun Life pension of about \$1,500 a month, was terminated in October of 2000 when Mr. Assoun failed to provide evidence of continuing disability. Between the time of his arrest and September 1, 1999, when his brother Kevin Assoun was given power of attorney and took over his finances, he claims Dorothy Bersuk forged cheques and depleted his account. He stated in evidence before Justice Cromwell that he did not discover this until June 1999, when he went to pay a \$10,000 retainer to a lawyer, Patrick Atherton, to represent him at his trial. He was only able to pay \$4,500, which Mr. Atherton returned to Ms. Bersuk, who did not replace it in the account. Justice Cromwell had serious concerns about the credibility of Mr. Assoun's evidence respecting Ms. Bersuk. He estimated that funds totaling not less than \$32,000 had not been accounted for by Mr. Assoun since the fall of 1999.
- [4] Mr. Assoun testified on the hearing of the application that Ms. Bersuk had deposited his pensions for him but he had not authorized her to withdraw money from the account, with the exception of the money to pay Mr. Atherton. He says she withdrew his other money fraudulently by means of forged cheques. He has not been in contact with Ms. Bersuk since August of

1999. She had sent him a “John Deere” letter and had not responded when he tried to telephone her. He believed her to be living in Cape Breton, Nova Scotia.

- [5] Ms. Bersuk’s conduct had been reported to police, but they had not acted because the complaint was made too long after the events. I am satisfied that the substantial amounts Ms. Bersuk is alleged to have taken can no longer realistically be considered available to Mr. Assoun for obtaining legal assistance.
- [6] Both applications for the assignment of counsel were made pursuant to s. 684 of the *Criminal Code*, which provides:

684. (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

(3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

- [7] Justice Cromwell found it to be “abundantly clear that it would be in the interests of justice that Mr. Assoun have legal assistance.” The appellant has limited formal education and the appeal was more than merely arguable in the sense that it contained numerous and complex issues:

. . . this was a complex murder trial, “loaded” with a large number of issues relating to the admissibility of evidence, . . . there are a number of complex legal issues that go to the heart of the conviction.

- [8] I am in full agreement with, and accept, Justice Cromwell’s conclusions on this issue and there is no need for me to review them here. My concern is with the other issue, whether it appears that the accused has not sufficient

means to obtain the legal assistance that the interests of justice require. On the evidence before him, which left a substantial amount of money unaccounted for, Justice Cromwell was unable to conclude that Mr. Assoun was without means to obtain counsel.

- [9] Mr. Assoun is represented on this new s. 684 application by Jerome P. Kennedy of the Newfoundland bar, whom he wishes to have assigned as his counsel on the appeal. Mr. Assoun is able to pay Mr. Kennedy's disbursements for the application, but there is no present arrangement for paying his fees for the application, and none respecting the appeal.
- [10] In addition to further affidavit evidence from Mr. Assoun, Mr. Kennedy has obtained affidavits from Mr. Assoun's brother Kevin Assoun and Kevin Assoun's common-law wife Brenda Williams. These purport to account for funds received by Kevin Assoun for the appellant during the three year period that Kevin Assoun has had charge of the bank account. Mr. Kennedy submits that if similar evidence had been available to Justice Cromwell, the outcome of the first application might have been different. He cites *R. v. Bernardo*, [1997] O.J. No. 5091 (Ont. C.A.), in which a panel of the Ontario Court of Appeal appointed counsel after reviewing transcript material that had not been available to the chambers judge who had earlier refused a s. 684 application. While the issue in *Bernardo* was the interests of justice rather than sufficiency of funds, the principle is similar.
- [11] In *Bernardo* it was concluded that s. 684:

... gives a judge of the court and the court concurrent jurisdiction to consider a request for the appointment of counsel: **R. v. Foster** (1954), 110 C.C.C. 214 at 215 (Ont. C.A.); **R. v. Walker** (1978), 46 C.C.C. (2d) 124 (Que. C.A.). Where deemed appropriate, the court may exercise its jurisdiction under s. 684 even though a judge of the court has previously refused an application under that section.

- [12] The standard must be one of highest deference to the previous findings of the court or a judge of the court. Even if I disagreed with the manner in which discretion was exercised on the first application, which I do not, I would not consider myself justified in substituting my own discretion for that of the judge on the first application in the same circumstances. Therefore a change in circumstances must be shown. In the first application a substantial amount of income could not be accounted for. In this

- application the appellant is putting forward evidence which, if accepted, would account for the funds in question.
- [13] This evidence relates to facts that existed at the time of the first hearing but the evidence itself did not exist until it was painstakingly retrieved from financial records and assembled into affidavits sworn to by Kevin Assoun and Brenda Williams. It was not before Justice Cromwell. It had to be brought into existence before it could be made available for consideration. In my view it reflects a change in the circumstances reflected by the previous decision respecting the assignment of counsel. (See *R. v. Innocente*, [2000] N.S.J. No. 347 (C.A.) (Q.L.)).
- [14] I am mindful of the balance that must be struck between the demands a costly appeal will make upon the limited financial resources of this province, and the interests of justice. In *Bernardo*, noting that it was not possible to regard the appellant with “anything short of revulsion,” Doherty, J.A. stated for the court:

He must, however, be afforded the opportunity to appeal provided by the law of the land. Where that opportunity cannot be meaningfully exercised without the assistance of counsel, he must have counsel. In a real sense, it is in the most iniquitous of cases that the dispassionate fairness of the criminal justice system is most severely tested. It must meet the challenge. To do otherwise, would be to discredit the very system of justice that demands that the appellant be held accountable for his acts.

- [15] The respondent submits that counsel should not be assigned under s. 684 until the appellant has met the burden of proving that he is without sufficient means to obtain counsel and has exhausted all other financial resources, including Legal Aid. Mr. Assoun has been denied legal aid for his appeal. The respondent cited *R. v. Grenko (I.G.)*, [1994] 127 N.S.R. (2^d) 355 for the deference this court will accord Legal Aid decisions in s. 684 applications, but *Grenko* involved a conclusion that the appeal lacked merit. Therefore the issue was whether the interests of justice required the assignment of counsel, and not the sufficiency of the appellant’s resources. Even if this court determines that the criteria have been met for assigning counsel pursuant to s. 684(1), a further recourse may be made to Nova Scotia Legal Aid under s. 684(2) before the Attorney General is required to fund the appeal. Section 684(3) provides some control over the amount.
- [16] In the present matter, the appellant himself muddled the waters by obtaining the services of Legal Aid by “false statements or concealment in relation to

his income,” and an affidavit to the court containing “half truths.” In Justice Cromwell’s view the appellant had concealed income and misled Legal Aid concerning his financial ability to retain counsel. At the beginning of his trial Mr. Assoun discharged the legal aid counsel who had represented him during the preliminary inquiry and Nova Scotia Legal Aid refused to appoint another. It did not appear that Legal Aid was made aware of Mr. Assoun’s \$2,000 per month in disability income until it was considering his appeal from its decision refusing him counsel, which it dismissed. Mr. Assoun was self-represented at the trial, and his requests to have counsel appointed were rejected by the trial judge.

- [17] I consider that Justice Cromwell refused the application to assign counsel not because of a lingering possibility that Mr. Assoun might still obtain legal aid, but because Mr. Assoun’s dealings with Legal Aid raised credibility issues that left him with no credible evidence as to what happened to some \$32,000 of income which might have been applied to retain counsel. Unable to conclude from the evidence that Mr. Assoun lacked sufficient means to obtain legal assistance, Justice Cromwell detailed his concerns in the following eight points at the conclusion of his decision:

1. Mr. Assoun’s affidavit does not disclose, explain or offer any excuse for his failure to disclose his income at the time of his successful application for legal aid in May of 1998.
2. Mr. Assoun’s affidavit in relation to his dealings with Mr. Atherton [Patrick Atherton, a lawyer who agreed to represent him during the trial for a \$10,000 retainer] is at variance with the representations made in open court by Mr. Atherton during the trial. As noted, Mr. Assoun’s affidavit asserts that Mr. Assoun lacked sufficient money to retain Mr. Atherton whereas at trial Mr. Atherton confirmed to the Court that he had been fully retained subject only to a suitable trial schedule being arranged. The additional submissions filed by Mr. Zimmer [Warren Zimmer, a lawyer who could not act for Mr. Assoun but who provided him with legal assistance] in response to the invitation from the Court in effect confirm that the version of why Mr. Atherton did not act given by Mr. Assoun in his affidavit was, at best, a half truth.
3. Mr. Assoun swears in his affidavit that he knew in June of 1999 that he lacked sufficient funds to retain counsel but it appears that, apart from some inquiries made on his behalf by his girlfriend, he did not seek further legal assistance from Legal Aid until August 26. It further appears from the trial transcript that he persisted over the summer months in attempting to retain counsel privately.

4. There is no disclosure as to whether Mr. Assoun drew his disability income to the attention of Legal Aid when he reapplied in August of 1999. The fact that Legal Aid does not appear to have commented on that income in its decision refusing to provide services at that time supports an inference that the income was not disclosed.

5. Mr. Assoun swears that by early June of 1999 (the time he was dealing with Mr. Atherton) he had his first indication that “something was not right” with his bank account. He maintains, however, and without explanation, that he did not become aware of the “full extent” of what he refers to as “Dorothy Bersuk’s fraud” until late 1999 even though it is clear from the trial transcript and Mr. Zimmer’s post-hearing submissions that Mrs. Bersuk was in communication with and purporting to assist Mr. Assoun over the summer of 1999. [Dorothy Bersuk was the girlfriend with whom Mr. Assoun was living at the time of his arrest in British Columbia.]

6. Mr. Assoun swears in his affidavit that Ms. Bersuk made her last fraudulent withdrawal from his account in early December of 1999. His disability income continued until the end of October of 2000. There is no evidence from Mr. Assoun as to what happened to the roughly \$24,000 that he received from CPP disability and Sun Life disability over that period, or of the income received between then and now [estimated by Justice Cromwell at some \$8,000 to April, 2002].

7. There is no sworn information about the basis of the termination of the disability payments in October of 2000. That termination roughly coincided with his re-application to Legal Aid for legal services for the appeal.

8. Mr. Assoun indicated to the trial judge that, with a couple of days adjournment, he might be able to obtain assistance from his family to retain a lawyer. Two days later, Mr. Atherton appeared for trial, apparently fully retained subject to scheduling. It appears from Mr. Zimmer’s affidavit that it was Mr. Assoun’s brother who approached him to assist Mr. Assoun both during the trial and afterward in connection with the appeal. Mr. [Duncan] Beveridge was privately retained for the sentencing. Mr. Assoun’s brother, Kevin, has held the power of attorney on the bank account since late 1999, but as noted, there is no disclosure of where any of the money deposited to the account since then has gone. Apart from a broad statement in Mr. Assoun’s affidavit that he has no other financial resources available to him to allow him to retain counsel for his appeal and no where else to turn, there is no indication that he has made any specific inquiries.

- [18] These points were addressed by Mr. Assoun in an affidavit sworn before Mr. Kennedy September 15, 2002 and in affidavits of Kevin Assoun and Brenda Williams sworn in Coquitlam, British Columbia, September 14, 2002.
- [19] The concerns about Legal Aid and the Atherton retainer that shook Justice Cromwell's confidence in Glen Assoun's credibility do not taint the credibility of Kevin Assoun and Brenda Williams, whose affidavit evidence bears directly on the central question in this application, whether the appellant has sufficient means to obtain the legal assistance he needs.
- [20] Kevin Assoun says Brenda Williams conducted the actual review of the records, but he assisted her and had knowledge of the accounts. Both attest to the accuracy of their figures in their affidavits, on which they expected to be cross-examined. Kevin Assoun took over the bank account as of September 1, 1999. His affidavit does not state the balance at that time, but transaction records attached to an earlier affidavit by Glen Assoun show the account contained less than \$500 after a \$1,200 cheque payable to Dorothy Bersuk was cashed August 31, 1999. The affidavit then deals with deposits and withdrawals from September 1, 1999 to the date of the affidavit, September 14, 2002.
- [21] The only income was Sun Life disability payments averaging \$1,515.06 from September 1, 1999 to October 30, 2000, for a total of \$21,072, and Canada Pension disability payments averaging \$515.00 for a total of \$18,521.44 for the period between September 1, 1999 and the date of the affidavit. The total from the two sources is \$39,593.44.
- [22] Withdrawals include legal fees of \$6,123 paid to Duncan Beveridge, \$12,000 paid to Warren Zimmer, \$2,000 to Jerome P. Kennedy to cover a disbursement invoice; and fees of \$3,890 paid to private investigators. Telephone calls to and from Glen Assoun amounted to \$2,900 and \$1,110 was sent to other family members to cover the cost of collect telephone calls. Kevin Assoun's travel expenses for five separate trips from British Columbia to Halifax are estimated at \$5,000 to \$6,000 and supported by credit card statements totaling \$4,453.65. Deposits into Glen Assoun's account in prison totalled \$1,150. All disbursements with the exception of Kevin Assoun's travel expenses additional to his credit card are supported by receipts and records.

- [23] In addition Dorothy Bersuk managed to make one final unauthorized withdrawal of \$1,200 December 4, 1999, necessitating further steps to secure the account.
- [24] The affidavit refers to an attached July 2002 bank statement showing a balance of \$1,405.46. That plus a subsequent CPP cheque of \$533.17, presumably deposited in August, has “been set aside to cover Mr. Kennedy’s disbursements in preparing and arguing the appointment of counsel application.”
- [25] By my arithmetic this accounts for a total of \$38,811.53, leaving less than \$1,000 unaccounted for of Glen Assoun’s \$39,593.44 income since September 1, 1999.
- [26] Mr. Kennedy wrote Sun Life to ascertain the status of Glen Assoun’s disability pension and was advised his claim was suspended because he did not return the completed supplementary medical form sent to him in August 2000. This required completion by his treating physician. In response to a follow-up letter he was told Sun Life would require “medical proof of ongoing total disability from the doctor who has been treating him regularly” since October 2000. The correspondence is attached to Mr. Kennedy’s affidavit, in which he stated:

As can be seen from the applicant’s affidavits he has been employed full time since he has been in prison and to the best of my knowledge has not been seen regularly by a medical doctor in prison.

- [27] As the disability pension was dependent on Mr. Assoun’s disability, which does not prevent his full time employment in prison, I consider it more probable than not that the Sun Life pension is no longer available to him.
- [28] Mr. Assoun’s affidavit states he receives \$42 income every two weeks from his prison employment, which goes into the account from which he makes canteen purchases. He asserts he has no other financial resources apart from those outlined in the affidavit of Kevin Assoun.
- [29] Kevin Assoun states his belief that his brother does not have “any hidden assets or funds or that he has any funds available to fund an appeal other than his CPP disability income.” He says he “cannot find a lawyer who is willing to argue Glen’s appeal based on taking an assignment of his CPP disability.” He says he has approached everyone in his family of five brothers and sisters and “none of us have the necessary financial resources to

fund Glen's appeal," based on an estimate of \$35,000 to \$60,000 received from Duncan Beveridge.

- [30] Jerome Kennedy says he was first contacted as the regional representative in Atlantic Canada of the Association in Defence of the Wrongfully Convicted (AIDWYC) but is acting in a private capacity because AIDWYC assistance can only be offered when all avenues of appeal have been exhausted. He agreed to present this application on the basis that his disbursements would be paid, although he was aware "there was no money available to pay my legal fees."
- [31] He says he has been paid by Legal Aid for 250 to 305 hours in each of three previous murder appeals which he had argued, and estimated the present appeal would involve a minimum of 300 hours because there are 4,000 pages of transcript to be reviewed in detail, the full disclosure file has to be reviewed with a view to a possible fresh evidence application, it would be necessary to meet with the appellant to review the details of the trial process in which he represented himself, and a number of complex evidentiary issues required research and preparation. His hourly rate is \$215 and the cost of the appeal, "if I was paid privately, would be \$64,500 plus H.S.T." If an order is made appointing counsel he would be willing to act for Mr. Assoun as requested in his affidavit, "if satisfactory financial arrangements are made."

Conclusion

- [32] It is my opinion, as it was that of Justice Cromwell, that it appears desirable in the interests of justice that the appellant Glen Eugene Assoun should have legal assistance in the appeal of his second degree murder conviction. Unlike Justice Cromwell, I have before me evidence which I consider credible that establishes to a preponderance of probability that Mr. Assoun has not sufficient means to obtain that assistance. I refer in particular to the affidavit of Kevin Assoun and the exhibits which support it, together with the financial records which were submitted as exhibits in support of the affidavit of Glen Assoun. I find Kevin Assoun's affidavit, supported by the affidavit of Brenda Williams, to be internally consistent and a reasonable accounting for the limited income of Glen Assoun over the relevant three-year period since September 1, 1999.
- [33] I am satisfied to a preponderance of probabilities that Mr. Assoun has exhausted all sources of funding available to him for obtaining counsel. The Nova Scotia Legal Aid Commission at present stands behind its decision not

to provide legal aid for Mr. Assoun's appeal. The inquiries that have been made on Mr. Assoun's behalf to reinstate the Sun Life disability pension he previously enjoyed have been met with a requirement for evidence of ongoing disability that it does not appear he can provide. I will accept Mr. Kennedy's undertaking that this possibility will be pursued to a more definitive conclusion, but it is not necessary to delay matters for that reason. I will ask Mr. Kennedy to report the results of this effort to the Attorney General, and will order an accounting to the Attorney General for any funds received from this source.

- [34] On the whole of the evidence before me, therefore, I have concluded that it is desirable in the interests of justice that Glen Assoun should have legal assistance and that it is apparent he does not have sufficient means to obtain that assistance. I therefore order pursuant to s. 684(1) that counsel be assigned to act on behalf of the appellant on the appeal to which he is a party, and in all proceedings preliminary or incidental thereto, including this application. Mr. Kennedy is being paid his disbursements for this application, and I will fix his costs at \$1,500. If counsel cannot agree on the form of the order, I will hear them at a later date. As it is obvious that counsel appointed at this late date cannot reasonably be expected to be prepared for an appeal scheduled for November 12, 2002, I will adjourn the hearing of that appeal without day.

Freeman, J.A.